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No. 431.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

UNION BRIDGE COMPANY, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR THE UNITED STATES.

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BRIEF FOR THE UNITED STATES.

The question of law involved in this case is the constitutionality of section 18 of the river and harbor act of March 3, 1899. The plaintiff in error contends that said section is unconstitutional in that it attempts to take and destroy private property for public use without due process of law and without just compensation, and that in addition thereto it undertakes to delegate to the Secretary of War and the Chief of Engineers of the United States Army both legislative and judicial powers.

THE LAW—SECTION 18 OF THE ACT OF MARCH 3, 1899 (30 STAT. 1153).

> That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which

may hereafter be constructed, over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes, recommended by Chief of Engineers, that are required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States district attorney for the district in which such bridge is situated, to the end that the criminal proceedings hereinafter mentioned may be taken. If the persons, corporation, or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect, as hereinbefore required, from the Secretary of War, and within the time prescribed by him, willfully fail or refuse to remove the same or to comply with the lawful order of the Secretary of War in the premises, such persons, corporation, or associa-

tion shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars; and every month such persons, corporation, or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation, or association so offending to the penalties above prescribed: *Provided*, That in any case arising under the provisions of this section an appeal or writ of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court either by the United States or by the defendants.

The plaintiff in error, the Union Bridge Company, was on the 11th day of January, 1906, convicted in the United States District Court for the Western District of Pennsylvania upon a criminal information charging said company with having wilfully failed to alter its said bridge, which was alleged to be an unreasonable obstruction to navigation. Upon the trial of the case no issues of fact were raised, the defendant relying upon the unconstitutionality of the law. The trial court held the law constitutional and sentenced the bridge company to pay a fine of $5,000, to review which judgment and sentence this writ of error is prosecuted direct to this court under the specific authority contained in the final paragraph of section 18.

CHARACTER OF THE BRIDGE IN CONTROVERSY.

The Union bridge is a pier-supported wooden structure and crosses the Allegheny River from Pittsburg to Allegheny City, being the first bridge on said river above its confluence with the Monongahela. It was built in 1874 and 1875 by the Union Bridge Company, a corporation chartered by the State of Pennsylvania in 1873, and the bridge was open for travel in July, 1875. The Government has built, or has now in process of construction, a system of locks and dams on the Allegheny River which will slack water the stream for 27 miles from its mouth. The Davis Island Dam, situated 5 miles below Pittsburg on the Ohio River, raised the water in the Allegheny and Monongahela at their junction 6 feet above their normal depth and backs the water to the first dams of the Allegheny and Monongahela slack-water systems, respectively. These waters form the harbor of Pittsburg; the importance of which harbor will be appreciated from the fact that the tonnage in water transportation passing from it in the past year exceeded that of the Suez Canal for the same period. (Record, p. 117.) To prove that the Union Bridge is an unreasonable obstruction to navigation it is only necessary to compare its clear height above the pool made by the Davis Island dam with the height of such boats as would navigate the Allegheny River were they not prevented from so doing by this bridge. The clear height of the

bridge in question above Davis Island pool is about 36 feet. The following is the height of each and every packet, with chimneys down, that runs south from Pittsburg:

Kanawha, 47 feet.
Greenwood, 46 feet.
Lorena, 47 feet.
Ben Hur, 46 feet.
Avalon, 42 feet; 46 feet 2 inches to top of whistle.
Virginia, 50 feet; 56 feet to top of ornaments.
Queen City, 50 feet 3 inches; 56 feet to top of ornaments.
Keystone State, 45 feet; 47 feet 6 inches to top of ornaments.

The height of the average towboat engaged in transporting the products of this district south is about 45 feet with chimneys down. This bridge stands, therefore, as a permanent bar to a reasonable interstate commerce by water transportation between the valleys of the Allegheny, Monongahela, and the Ohio rivers. It further prevents vessels plying upon the Monongahela and the Ohio rivers during stress of floods or floating ice from seeking shelter and protection in the Allegheny River, the floods and ice-runs out of the Allegheny River being seldom coincident with those out of the Monongahela.

In addition to the unreasonable obstruction to navigation made by this bridge, on account of its insufficient height and width of spans, the cheap

method followed in its pier construction has forced upon the company the necessity of occupying, by the riprap protection of the piers, 247 feet of the waterway of the river over and above that necessary for piers when properly built. In the opinion of the Secretary of War the interests of navigation demand that this bridge shall have a channel span giving a clear height of 70 feet above the pool made by the Davis Island Dam, and a clear width of 394 feet. (Record, p. 99.)

Upon the hearing the bridge company presented an answer in which it said, among other things, "the proposition embodied in the notice from the Government will require the removal of the present structure. If carried out it will result in the entire suspension of the operations of this company, because the investment can not yield any adequate return for the capital." No question or issue of the bridge being an unreasonable obstruction to navigation was raised by the answer. Attention being specifically called to this point, the bridge company, thru its counsel, stated, "I purposely omitted that because I thought it was a question largely in the discretion of the Government, and, as I said, I did not care to occupy an antagonistic position, but to suggest our situation to the Government." The court below in its opinion said, "in passing it will be noted that no effort was made by the bridge company to question then (upon the hearing) or at the jury

trial the fact that this bridge was an unreasonable obstruction to navigation." (Record, p. 121.)

THE CONSTITUTIONAL QUESTIONS INVOLVED.

First. It is contended that this law attempts to take and destroy private property of the Union Bridge Company without due process of law.

Second. That the act undertakes to authorize the taking of private property for public use without just compensation.

Third. That by the terms of said act it undertakes to delegate to the Secretary of War of the United States and the Chief of Engineers of the United States Army both legislative and judicial power in contravention of the Constitution of the United States.

ACTS OF CONGRESS WHEREIN THE CONTROL OF BRIDGES OVER THE NAVIGABLE WATERS OF THE UNITED STATES HAS BEEN ASSUMED BY THE GENERAL GOVERNMENT.

Prior to the year 1884 Congress had never attempted by a general law to exercise control over or to direct alterations and changes to be made with respect to bridges which had been erected under authority of law over navigable streams lying wholly within the boundaries of a particular State. On the authority of the Willamette Iron Bridge Company (125 U. S., 1), it would seem that up to 1884 the executive officers of the Federal Government were without power to proceed against the Union Bridge Company, even tho up to that time

such bridge did unreasonably obstruct the navigation of the Allegheny River, for the reason that Congress had failed to enact any special or general law, under which action by the Federal authorities could have been taken.

Since the year 1884 Congress has past five different laws, each of which has conferred upon the Secretary of War certain administrative powers or duties relative to the control and regulation of railroad and other bridges which have been constructed across navigable waters of the United States under substantially the same circumstances and conditions as the bridge here under discussion. These acts are as follows:

1. Section 8 of the Act of July 5, 1884 (23 Stat., 123, 148).

2. Sections 9 and 10 of the Act of April 11, 1888 (25 Stat., 400, 423).

3. Sections 4 and 5 of the Act of September 19, 1890 (26 Stat., 426, 453).

4. Section 18 of the Act of March 3, 1899 (30 Stat., 1153).

5. Sections 4 and 5 of the Act of March 23, 1906 (33 Stat., 84, 85).

PLENARY POWER OF CONGRESS TO REGULATE BRIDGES.

Before taking up the discussion of the constitutional questions involved in this case, we desire particularly to point out the fact that Congress has plenary power to require the Union Bridge Company to either entirely remove its bridge across the

Allegheny River at Pittsburg or to compel it to make the alterations specified in the order of the Secretary of War. Such power has been frequently recognized in the decisions of this court, among which the following may be noted:

In the case of the *Willamette Iron Bridge Company* v. *Hatch* (125 U. S., 1, 12) the court said:

> And although, until Congress acts, the States have the plenary power supposed, yet, when Congress chooses to act, it is not concluded by anything that the States, or that individuals by its authority or acquiescence, have done, from assuming entire control of the matter, and abating any erections that may have been made, and preventing any others from being made, except in conformity with such regulations as it may impose. It is for this reason, namely, the ultimate (though yet unexerted) power of Congress over the whole subject-matter, that the consent of Congress is so frequently asked to the erection of bridges over navigable streams.

In the case of *Escanaba Company* v. *Chicago* (107 U. S., 678, 683) the power of the State in the absence of Congressional legislation to maintain and regulate bridges over navigable waters was recognized. But as to the dominant power of Congress Mr. Justice Field said:

> When its (the State of Illinois) power is exercised, so as to unnecessarily obstruct the navigation of the river or its branches, Con-

> gress may interfere and remove the obstruction. If the power of the State and that of the Federal Government come in conflict, the latter must control and the former yield. This necessarily follows from the position given by the Constitution to legislation in pursuance of it as the supreme law of the land. But until Congress acts on the subject the power of the State over bridges across its navigable streams is plenary.

If, therefore, Congress possesses plenary power *in specific cases* to compel the owners of bridges across navigable waters of the United States which have been erected under State authority to remove the same or to make such changes and alterations as shall render navigation under such bridges reasonably free, easy, and unobstructed, there exists no good reason for denying to Congress the power to exert the same control *by a general law* over bridges so erected and maintained. Such general power was distinctly recognized by this court in the case of *Gilman* v. *Philadelphia* (3 Wall., 713, 731), in which Mr. Justice Swayne, speaking for the court, said:

> Lastly, Congress may interpose, whenever it shall be deemed necessary, by general or special laws. It may regulate all bridges over navigable waters, remove offending bridges, and punish those who shall thereafter erect them. Within the sphere of their authority both the legislative and judicial power of the nation are supreme. A

different doctrine finds no warrant in the Constitution and is abnormal and revolutionary.

The act of Congress which is now before the court is *general* in its operation and was evidently designed as an additional means by which bridges erected by authority of law should be controlled by the Federal Government. On the authority of the decisions of this court, above referred to, we believe that we are justified in assuming that Congress has the power to compel the Union Bridge Company to either remove its bridge or make the alterations and changes specified by the Secretary of War, in order to render the navigation of the Allegheny River reasonably free, easy, and unobstructed, and to make the wilful failure of the bridge company to remove its bridge or make such alterations within a reasonable time a misdemeanor, punishable by fine. The only question, therefore, remaining for consideration is whether the law which Congress has enacted for the purpose of bringing about such a result is a constitutional exercise of legislative power. The answer to this question leads us to a discussion of the various provisions of the law itself, with special reference to the contentions of the plaintiff in error which challenge its constitutionality.

I.

SECTION 18 OF THE ACT OF MARCH 3, 1899, DOES NOT CONTEMPLATE A DENIAL OF DUE PROCESS OF LAW.

Neither the Federal nor the State constitutions have made any attempt to define precisely what is meant by "due process of law," nor have the courts attempted to give a definition covering all possible cases. It has been said that the courts will not attempt to define in a few words what is meant by those terms, but are disposed to ascertain their intent and application by the gradual course of judicial inclusion and exclusion as the cases presented for decision shall require, together with the reasoning on which such decisions may be founded.

Davidson v. *New Orleans*, 96 U. S., 97.
Holden v. *Hardy*, 169 U. S., 366.

A definition which has been frequently quoted is, that due process of law in each particular case means such an exercise of the power of the Government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs. (Cooley Constitutional Limitations, 6th edition, 434.)

Administrative process, which has been regarded as necessary by the Government and sanctioned

by long usage, is as much due process of law as any other.

Wulzen v. *San Francisco*, 101 Cal., 15.
Attorney-General v. *Jochin*, 99 Mich., 358.
Eames v. *Savage*, 77 Maine, 212.
Holmes v. *Seeley*, 19 Wend., 507.
Ex parte Milligan, 4 Wall., 2.

Due process of law does not necessarily require that a judicial hearing shall be accorded before any preliminary action can be taken by the administrative officers of the Government which may result in a temporary deprivation of certain rights of a citizen. If the law contemplates that the citizen whose rights are affected by certain administrative acts and processes shall finally be accorded an opportunity to have those rights past upon in a judicial proceeding, then and in such case due process of law has not been denied within the meaning of the Constitution. (*Murrays Lessee et al.* v. *Hoboken Land Company*, 18 Howard, 272, 280, 284.)

(a) WHERE PUBLIC RIGHTS OF THE CITIZEN ARE AFFECTED.

While it is manifest that a law can not withdraw from judicial determination a controversy with respect to *private rights* which from its nature is the subject of a suit at common law, or in equity, or in admiralty, it is likewise clear that in respect to matters involving *public rights* as distinguished from *private rights* the legislature may provide

that so far as the determination of facts are concerned that the action of the administrative officers may be made final and conclusive.

Kennedy v. *Gibson*, 8 Wall., 498.
Casey v. *Galli*, 94 U. S., 673.
United States v. *Knox*, 102 U. S., 422.
Bushnell v. *Leland*, 164 U. S., 684.
Buttfield v. *Stanahan*, 192 U. S., 470.
Public Clearing House v. *Coyne*, 194 U. S., 497.

In this class of cases the courts will, however, always take jurisdiction for the purpose of ascertaining whether the administrative officer acted within or without the statute; and if the court should determine that such officer was acting within the purview of the statute, then his findings of fact upon such matters as have been committed to his discretion will not be reviewed by the courts, but if it should appear to the court that he acted wholly without the statute and without authority of law, a court of equity will grant relief. (*Magnetic Healing Company* v. *McAnnulty*, 187 U. S., 94.)

(b) WHERE THE PRIVATE RIGHTS OF THE CITIZEN ARE INVOLVED.

There is yet another class of cases which involve the *private rights* of the citizen with reference to which it would seem that Congress is without authority to withdraw from judicial determination the facts and make the finding of the administrative officers of the Government *final* and *conclusive*.

With respect to this class of cases, however, it is clear that *preliminary* to a judicial determination the legislative power may confer upon administrative officers authority to ascertain and determine such facts respecting purely private rights, leaving to the private citizen, should he consider himself aggrieved by such finding, the right to go into court and have those facts reconsidered and determined *de novo*. (*Chicago, Milwaukee and St. Paul Railway Company* v. *Minnesota*, 134 U. S., 418.)

The question in this case was the constitutionality of a statute of Minnesota which established a railroad commission and undertook to clothe it with power to make rates which would be *final* and *conclusive*.

Mr. Justice Blatchford, in delivering the opinion of the court, said:

> It (the statute) deprives the company of its right to a judicial investigation by due process of law under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission, which, in view of the powers conceded to it by the State court, can not be regarded as clothed with judicial functions or possessing the machinery of a court of justice.

The court, however, intimated in that case that if the statute of the State of Minnesota had been

construed by the Supreme Court of that State as merely giving the commission the power to fix the rates, leaving the subject-matter to be reviewed in a judicial proceeding if the company should feel itself aggrieved by the action of the commission, in such a case the law would have been constitutional, for the reason that it would have provided for due process of law. The court said:

> In view of the opinion delivered by that court (the Supreme Court of the State of Minnesota), it may be impossible for any further proceedings to be taken other than to dismiss the proceeding for a mandamus, if the court should adhere to its opinion that, under the statute, it can not investigate judicially the reasonableness of the rates fixed by the commission.

From what has been said it will be seen that with respect to questions involving the *public rights* of a citizen the legislature may prescribe that administrative officers shall determine *finally* and *conclusively* questions of fact submitted to them under positive directions of law, and that the decisions of such officers upon these facts will not be reviewed by the courts, *except* for the purpose of ascertaining whether or not such administrative officers acted with respect to the matter clearly *within the scope of their authority.*

On the other hand, if the subject of the controversy be a *private right* of an individual citizen, then and in such case the legislature may author-

ize administrative officers to pass upon and ascertain questions of fact *preliminary* to a judicial hearing, preserving however to the citizen whose rights may be affected an opportunity to have the whole matter reviewed in a judicial proceeding, should he feel himself aggrieved by the finding of fact made by such administrative officer.

PUBLIC AND PRIVATE RIGHTS DEFINED.

Under the head of public rights may be included such rights as are conferred by statute and all those rights not amounting to vested rights and over which the legislature has exclusive control. Under the head of private rights would properly fall those vested rights of the citizen of which he can not be deprived save by a judicial determination or some proceeding equivalent thereto.

SECTION 18 OF THE ACT OF MARCH 3, 1899.

It is unnecessary to determine in this case whether section 18 of the act of March 3, 1899, makes the finding of fact of the Secretary of War, that the bridge unreasonably obstructs navigation, final and conclusive, for the reason that no attempt was made upon the trial to have such finding of fact reviewed. Whether the law here under consideration confers upon the owners of a bridge charged with having violated this law the right to a judicial review of the finding of fact made by the Secretary of War is a question of

statutory construction and is not now presented to this court for review.

The further question as to whether Congress would have the power in a case of this kind to make the finding of the Secretary of War upon such question of fact final and conclusive is a constitutional question and depends upon whether the right affected is a *public* or a *private* right. We are inclined to the opinion that it is a public right and that Congress might have made the action of the Secretary of War final for the following reason: Congress might have declared by a special act this bridge to be an unreasonable obstruction to navigation and required the owners of the brige either to remove the same or to make such alterations and changes as Congress should specify. If this could have been done by the Congress without a judicial hearing it illustrates very clearly that the right here involved is a *public right* which the law making power has the authority to take away at any time; the right involved being of such a character it must follow that it is a public right with respect to which Congress would have the power to make the finding of an administrative officer final and conclusive. The only question involved, however, is the general question as to whether the section provides for due process of law which in any view of the case, as we think, should be answered in the affirmative.

II.

THIS LAW DOES NOT OPERATE TO TAKE PRIVATE PROPERTY FOR PUBLIC USE WITHIN THE MEANING OF THE FIFTH AMENDMENT TO THE FEDERAL CONSTITUTION.

The law here under consideration does not attempt to take private property for public use. Altho Congress undoubtedly has the power to declare a bridge of this character an unreasonable obstruction to the free navigation of the Allegheny River and require that the bridge be removed, yet Congress by this law has stopt far short of the exercise of such power. There is no attempt to deprive the owners of bridges across navigable waterways of the United States, erected solely under State authority, of their right to maintain such bridges and receive the benefits arising therefrom. Congress has by this law simply declared that the owners of such bridges shall either remove them, if they unreasonably obstruct navigation, or make such alterations and changes at their own expense as will render navigation under them reasonably free, open, and unobstructed. Such a law can no more be regarded as a taking of private property for public use without compensation than a law which requires railroad companies engaged in interstate commerce to equip their cars with safety appliances and automatic couplers. In either case such a law requires an outlay and an expenditure of large sums of

money, but the property so acquired by such expenditures in each case still remains the property of the persons or corporations required by the law to make such expenditure. Upon this point the learned judge of the court below said:

> But it is contended, the act of Congress under which this proceeding is had is unconstitutional because it makes no provision for compensation and therefore violates the fifth amendment to the Constitution, which enacts, "nor shall private property be taken for public use without just compensation." In this connection it should be noted that the financial loss sustained by this company is not in point of fact of the serious character that would at first sight appear. It has a wooden bridge some thirty years old. In the natural life of such a structure it would not have been long, were the Government taking no steps, before the company would have to replace it and expend a large sum of money in so doing. It will thus be seen that the actual loss to the company is not the cost of erecting a new and modern bridge, but simply the profit arising from tolls during the life of its present structure. Moreover, the case does not fall within the literal terms of the constitutional provision, in that no "private property (is) * * * taken for public use." The facts are not as they were in the case of the *Monongahela Navigation Company* v. *The United States* (148 U. S., 312); its bridge is not taken and used by the Government for public purposes, as

were the dams and locks of the navigation company in that case. Indeed, the right of the bridge company to maintain a bridge and to collect tolls thereon is not denied, much less taken, and the effect of this proceeding is not to take or condemn its property, but is simply to compel the company to so use its property as not to interfere with the right of the public to an unobstructed use of the stream. It is simply the enforcement of the time-honored maxim which qualifies the absolutism of all property rights; *sic utere tuo ut non alienum laedas.* It would be a strange anomaly that a demand made by the law upon one to perform a lawful duty must be preceded by compelling the law enforcer to provide compensation to the law violator for what is maintained in violation of law. It seems to us the statement of such a proposition is an answer to a claim for compensation.

NEW ORLEANS GAS LIGHT COMPANY v. DRAINAGE COMMISSIONERS, 197 U. S., 453.

This case, in our judgment, is decisive of the question involved in the case at bar. The New Orleans Gas Light and Banking Company was given the exclusive privilege of vending gas in the city of New Orleans, and it was permitted to lay pipes and conduits at its own expense in the public ways and streets of New Orleans, having due regard for the public convenience. The Drainage Commission of New Orleans, authorized by the legislature

of Louisiana in 1896, was given power to control and execute a plan for the drainage of the city of New Orleans. Having adopted a system of drainage, it proceeded with the execution of its plans, and in the prosecution of such work it was found necessary to change the location in some places in the streets of the city of the mains and pipes theretofore laid by the New Orleans Gas Light Company. The changes were made by the gas light company, and an action was brought against the drainage commission to recover the cost of such changes. In the court of original jurisdiction a judgment was rendered in favor of the drainage commission, and on appeal to the Supreme Court of Louisiana a final decree was rendered affirming the judgment of the lower court. The case was brought to this court on a writ of error, the gas company claiming that its private property had been taken for public use without compensation.

Mr. Justice Day in delivering the opinion of this court disposed of such contention as follows:

> There is nothing in the grant to the gas company, even if it could legally be done, undertaking to limit the right of the State to establish a system of drainage in the streets. We think whatever right the gas company acquired was subject, in so far as the location of its pipes was concerned, to such future regulations as might be required in the interest of the public health and welfare. These views are amply sustained by the authorities. (*National Water*

Works Co. v. *City of Kansas*, 28 Fed. Rep., 921, in which the opinion was delivered by Mr. Justice Brewer, then circuit judge; *Gas Light & Coke Co.* v. *Columbus*, 50 Ohio St., 65; *Jamaica Pond Aqueduct Co.* v. *Brookline*, 121 Massachusetts, 5; *In re Deering*, 93 N. Y., 361; *Chicago, Burlington, &c., R. R. Co.* v. *Chicago*, 166 U. S., 226, 254.) In the latter case it was held that uncompensated obedience to a regulation enacted for the public safety under the police power of the State was not taking property without due compensation. In our view, that is all there is to this case. The gas company, by its grant from the city, acquired no exclusive right to the location of its pipes in the streets, as chosen by it, under a general grant of authority to use the streets. The city made no contract that the gas company should not be disturbed in the location chosen. In the exercise of the police power of the State, for a purpose highly necessary in the promotion of the public health, it has become necessary to change the location of the pipes of the gas company so as to accommodate them to the new public work. In complying with this requirement at its own expense none of the property of the gas company has been taken, and the injury sustained is *damnum absque injuria*.

The principles of law announced in that case may be applied in a most striking manner to the case at bar. There is nothing in the grant of authority from the State of Pennsylvania in 1873

to the Union Bridge Company to construct a bridge across the Allegheny River which in any manner undertakes to limit the right of the Federal Government to require at some future time changes and alterations to be made in the bridge as originally constructed in the interest of navigation. Whatever right the bridge company acquired under its charter from the State of Pennsylvania was subject, at least so far as the character of the bridge was concerned, to such future regulations as might be required by Congress in the interest of the free and unobstructed navigation of the Allegheny River. It therefore follows that uncompensated obedience to an act of Congress past for the purpose of securing the free, easy, and unobstructed navigation of the river is not equivalent to a taking of property without compensation. In the exercise of the Federal control over the navigable rivers of the United States, for a purpose highly necessary in the promotion of free and unobstructed navigation, it has become necessary to require certain changes and alterations in the Union bridge so as to render navigation under it reasonably free, easy, and unobstructed. In complying with such requirements at its own expense none of the property of the Union Bridge Company is being taken and the injury, if any be sustained, will be merely *damnum absque injuria*.

It would be difficult to find in the books a case in which the facts are more nearly parallel to the facts in the case at bar than are those in *New*

Orleans Gas Company v. *Drainage Commissioners*, *supra*.

Since the decision in the case at bar in the court below this court has rendered two opinions in which it has declared that a law requiring changes and alterations to be made in an obstruction to a public waterway at the expense of the owner does not attempt to take private property for public use in violation of the fifth amendment of the Federal Constitution.

CHICAGO, BURLINGTON AND QUINCY RAILWAY v. DRAINAGE COMMISSIONERS (200 U. S., 561).

In this case the question arose as to whether the drainage commissioners could require the railroad company to remove a bridge and culvert maintained by it over Rob Roy Creek, in Kendall County, Ill., or, if it continued to maintain a bridge and culvert at that point, that one be substituted that would meet the requirements of a certain plan of drainage adopted by the commissioners. The railroad contended that the commissioners could not require it to make the necessary changes at the expense of the railroad company, for the reason that it would amount to a taking of private property for public use without just compensation.

Mr. Justice Harlan, in delivering the opinion of this court, in an exhaustive review of the cases upon this subject, said:

> We hold that the police power of a State embraces regulations designed to promote

the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety. (*Lake Shore & Mich. South. Ry.* v. *Ohio*, 173 U. S., 285, 292; *Gilman* v. *Philadelphia*, 3 Wall., 713, 729; *Pound* v. *Turck*, 95 U. S., 459, 464; *Railroad Co.* v. *Husen*, 95 U. S., 470.) And the validity of a police regulation, whether established directly by the State or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable, and whether really designed to accomplish a legitimate public purpose. Private property can not be taken without compensation for public use under a police regulation relating strictly to the public health, the public morals, or the public safety, any more than under a police regulation having no relation to such matters, but only to the general welfare. The foundations upon which the power rests are in every case the same. This power, as said in *Village of Carthage* v. *Frederick* (122 N. Y., 268), has always been exercised by municipal corporations "by making regulations to preserve order, to promote freedom of communication, and to facilitate the transaction of business in crowded communities. Compensation has never been a condition of its exercise, even when attended with inconvenience or peculiar loss, as each member of a community is presumed to be benefited by that

which promotes the general welfare." The constitutional requirement of due process of law, which embraces compensation for private property taken for public use, applies in every case of the exertion of governmental power. If in the execution of any power, no matter what it is, the Government, Federal or State, finds it necessary to take private property for public use, it must obey the constitutional injunction to make or secure just compensation to the owner. (*Cherokee Nation* v. *Southern Kansas Railway* 135 U. S., 641, 659; *Sweet* v. *Rechel*, 159 U. S., 380, 399, 402; *Monongahela Nav. Co.* v. *United States*, 148 U. S., 312, 336; *United States* v. *Lynah*, 188 U. S., 445.) If the means employed have no real substantial relation to public objects which government may legally accomplish, if they are arbitrary and unreasonable beyond the necessities of the case, the judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such illegal action. The authority of the courts to interfere in such cases is beyond all doubt. (*Minnesota* v. *Barber*, 136 U. S., 313, 320.) Upon the general subject there is no real conflict among the adjudged cases. Whatever conflict there is arises upon the question whether there has been or will be in the particular case, within the true meaning of the Constitution, a "taking" of private property for public use. If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good

then there is no taking of property for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution. Such is the present case. There are, unquestionably, limitations upon the exercise of the police power which can not, under any circumstances, be ignored. But the clause prohibiting the taking of private property without compensation "is not intended as a limitation of the exercise of those police powers which are necessary to the tranquillity of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments. It has always been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property and though no compensation is given." (Sedgwick's Stat. and Const. Law, 434.)

WEST CHICAGO RAILROAD v. CHICAGO (201 U. S., 506).

For the purpose of obeying an act of Congress and in order to obtain a free and unobstructed navigation of the Chicago River for the benefit of commerce, interstate and domestic, the city council of Chicago past an ordinance requiring the West Chicago Street Railroad Company, within three months, at its own cost and expense, to lower its tunnel under the South Branch of the Chicago River, so as to provide for a clear depth above said tunnel of at least 21 feet of water at all times, such

work to be performed by the railroad company under the supervision and direction and subject to the approval of the commissioner of public works of the city of Chicago. The street railroad company refused to comply with the ordinance. Suit was thereupon instituted by the State of Illinois, on the relation of the city of Chicago, against the railroad company to compel its obedience. In the court of original jurisdiction judgment was rendered in favor of the railroad company. The Appellate Court of Illinois reversed the judgment and upon appeal to the Supreme Court of the State of Illinois the judgment was affirmed, awarding a peremptory writ of mandamus as prayed for in the petition. The case was brought to this court on a writ of error, one of the constitutional questions at issue being as to whether there was a taking of private property for public use without just compensation. This court, in an elaborate opinion by Mr. Justice Harlan, held against the contention of the railroad company.

> The principle is thus declared by a leading text-writer: "The privilege of navigation upon all waters which are capable of such use in their natural condition and are accessible without trespassing upon private lands, is a common and paramount right. . . . At common law the right of navigating a public stream is paramount to the right of passage across the stream by means of a bridge." (Gould on Waters, secs. 86, 88.)

If, then, the right of the railroad company to have and maintain a tunnel under the Chicago River is subject to the paramount public right of navigation; if its right to maintain a tunnel in the river is a qualified one, because subject to the specific condition in the act of 1874 that no tunnel should interrupt navigation; if the present tunnel is an obstruction to navigation, as upon this record we must take it to be; and if the city, as representing the State and public, may rightfully insist that such obstruction shall not longer remain in the way of free navigation; it necessarily follows that the railway company is under a duty to comply with the demand made upon it to remove, at its own expense, the obstruction which itself has created and maintains. If the obstruction can not be removed except by lowering the tunnel to the required depth and (if a tunnel is to be maintained) providing one that will not interrupt navigation, then the cost attendant upon such work must be met by the company. The city asks nothing more than that the railroad company shall do what is necessary to free navigation from an obstruction for which it is responsible, and (if it intends not to abandon its right to maintain a tunnel at or near Van Buren street) that it shall itself provide a new tunnel with the necessary depth of water above it.

In the case before us the public demands nothing to be done by the railroad company except to remove the obstruction which it-

self placed and maintains in the river under the condition that navigation should not at any time be thereby interrupted. The removal of such obstruction is all that is needed to protect navigation. So that whatever cost attends the removal of the obstruction must be borne by the railroad company. The condition under which the company placed its tunnel in the river being met by the company, the public has no further demands upon it. This can not be deemed a taking of private property for public use or a denial of the equal protection of laws within the meaning of the Constitution, but is only the result of the lawful exercise of a governmental power for the common good. This appears from the authorities cited in *Chicago, Burlington and Quincy R. R. Co.* v. *Drainage Commissioners*, *supra*, just decided. The State court has well said that to maintain the navigable character of the stream in a lawful way is not, within the meaning of the law, the taking of private property or any property right of the owner of the soil under the river, such ownership being subject to the right of free and unobstructed navigation. (*People* v. *West Chicago Street R. R. Co.*, 203 Illinois, 551, 557.) What the city asks, and all that it asks, is that the railroad company be required, in the exercise of its rights and in the use of its property, to respect the public needs, as declared by competent authority, upon reasonable grounds, to exist. This is not an arbitrary or unreasonable de-

> demand. It does not, in any legal sense, take or appropriate the company's property for the public benefit, but only insists that the company shall not use its property so as to interrupt navigation.

Further discussion of this question, in view of the authorities above referred to, would seem to be useless. It is idle to contend that a law requiring changes to be made in a bridge across a navigable water way of the United States, in the interest of navigation, is equivalent to a taking of private property for public use without just compensation. It therefore remains but to dispose of the third and last contention of the plaintiff in error, viz, that the law delegates to the Secretary of War legislative power.

III.

SECTION 18, UNDER WHICH THE PLAINTIFF IN ERROR WAS CONVICTED, DOES NOT DELEGATE TO THE SECRETARY OF WAR LEGISLATIVE OR JUDICIAL POWERS.

That Congress can not delegate legislative power to an executive officer is a principle of law that is universally recognized. But it has been frequently held that the legislature may delegate the power to an administrative or executive officer to determine some fact or state of things upon which the statute makes or intends to make its own operation depend. The authorities are so numerous that it would be useless to attempt to refer to all of them.

In the recent case of *Buttfield* v. *Stranahan* (192 U. S., 470, 496), this court, in an exhaustive review of the authorities upon this question, said:

> The claim that the statute commits to the arbitrary discretion of the Secretary of the Treasury the determination of what teas may be imported, and therefore in effect vests that official with legislative power, is without merit. We are of opinion that the statute, when properly construed, as said by the Circuit Court of Appeals, but expresses the purpose to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably so because of their inferior quality. This, in effect, was the fixing of a primary standard, and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute. The case is within the principle of *Field* v. *Clark* (143 U. S., 649), where it was decided that the third section of the tariff act of October 1, 1890, was not repugnant to the Constitution as conferring legislative and treaty-making power on the President, because it authorized him to suspend the provisions of the act relating to the free introduction of sugar, molasses, coffee, tea, and hides. We may say of the legislation in this case, as was said of the legislation considered in *Field* v. *Clark*, that it does not, in any real sense, invest administrative officials with the power of legislation. Congress legislated on the subject

> as far as was reasonably practicable, and from the necessities of the case was compelled to leave the executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted.

In the case of *Field* v. *Clark* (143 U. S., 649, 692) this court, speaking thru Mr. Justice Harlan, said:

> That Congress can not delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. The act of October 1, 1890, in the particular under consideration, is not inconsistent with that principle. It does not, in any real sense, invest the President with the power of legislation. For the purpose of securing reciprocal trade with countries producing and exporting sugar, molasses, coffee, tea, and hides, Congress itself determined that the provisions of the act of October 1, 1890, permitting the free introduction of such articles, should be suspended as to any country producing and exporting them that imposed exactions and duties on the agricultural and other products of the United States, which the President deemed, that is, which he found to be, reciprocally unequal and unreasonable. Congress itself prescribed, in ad-

vance, the duties to be levied, collected and paid on sugar, molasses, coffee, tea, or hides, produced by or exported from such designated country, while the suspension lasted. Nothing involving the expediency or the just operation of such legislation was left to the determination of the President. The words "he may deem" in the third section, of course, implied that the President would examine the commercial regulations of other countries producing and exporting sugar, molasses, coffee, tea, and hides, and form a judgment as to whether they were reciprocally equal and reasonable, or the contrary, in their effect upon American products. But when he ascertained the fact that duties and exactions, reciprocally unequal and unreasonable, were imposed upon the agricultural or other products of the United States by a country producing and exporting sugar, molasses, coffee, tea, or hides, it became his duty to issue a proclamation declaring the suspension, as to that country, which Congress had determined should occur. He had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by Congress. As the suspension was absolutely required when the President ascertained the existence of a particular fact, it can not be said that in ascertaining that fact and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws. Legislative power was exer-

cised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect. It was a part of the law itself as it left the hands of Congress that the provisions, full and complete in themselves, permitting the free introduction of sugars, molasses, coffee, tea, and hides, from particular countries, should be suspended, in a given contingency, and that in case of such suspensions certain duties should be imposed.

"The true distinction," as Judge Ranney, speaking for the supreme court of Ohio, has well said, "is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first can not be done; to the latter no valid objection can be made." (*Cincinnati, Wilmington, etc., Railroad* v. *Commissioners*, 1 Ohio St., 88.) In *Moers* v. *City of Reading* (21 Penn. St., 188, 202) the language of the court was: "Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it can not be said that the exercise of such dis-

cretion is the making of the law." So in *Locke's Appeal* (72 Penn. St., 491, 498): "To assert that a law is less than a law, because it is made to depend on a future event or act, is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed or to things future and impossible to fully know." The proper distinction, the court said, was this: "The legislature can not delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which can not be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation."

THE PRINCIPLE OF THESE TWO CASES APPLIED TO THE LAW HERE UNDER CONSIDERATION.

In *Buttfield* v. *Stranahan*, *supra*, the law under consideration made it unlawful for any person to bring into the United States teas inferior in purity and quality to the standards which were required to be fixt by the Secretary of the Treasury upon the recommendation of a board of seven tea experts. The constitutionality of the law was challenged on the ground that it delegated legislative power to the Secretary of the Treasury. In that

case the importation of teas was made lawful or unlawful according to the standards of quality fixt by the Secretary of the Treasury. The law did not become operative until the Secretary of the Treasury, with the recommendation of the board of tea experts, had fixt and established standards. Similarly, in the case at bar, the law here under consideration did not become operative until the Secretary of War ascertained the fact as to whether the bridge was an unreasonable obstruction to navigation. After such fact had been determined, the will of Congress imposed a duty upon the Bridge Company to alter and reconstruct its bridge in accordance with the plans and specifications of the Chief of Engineers, in order that the navigation of the Allegheny River might be rendered reasonably free, easy, and unobstructed. Failure to comply with such requirements within the time specified subjected the company to a criminal prosecution. In each case Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to the executive officials the duty of bringing about the result pointed out in the statute. To deny the power of Congress to delegate such a duty to an administrative officer would, in effect, amount to a declaration that the plenary power vested in Congress to require bridges across the navigable waters of the United States to be so altered and changed as not to unreasonably impede the free navigation of such waterways can not be efficaciously exerted.

In the case of *Field* v. *Clark*, *supra*, a law was under consideration which authorized the President to suspend by proclamation the free introduction of sugar, molasses, coffee, tea, or hides when he was satisfied that any country producing such articles imposed duties or other exactions upon the argricultural or other products of the United States which he should deem to be reciprocally unequal or unreasonable. This court, in holding that law constitutional, said that when the President had ascertained the fact that duties and exactions reciprocally unequal or unreasonable were imposed upon the agricultural or other products of the United States by a country producing and exporting sugar, molasses, coffee, tea, or hides, it became his duty to issue a proclamation declaring the suspension as to that country, which Congress had determined should occur, and that he had no discretion in the premises, except as to the duration of the suspension so ordered. The same is true with respect to the case at bar. The Secretary of War is required by the law to ascertain and determine the fact as to whether this particular bridge unreasonably obstructs the free navigation of the Allegheny River and to specify the particular changes and alterations to be made. When he has determined such fact, the law immediately comes into operation and imposes upon him a duty to notify the company to make the alterations necessary to render the navigation of the river reasonably free, easy, and unobstructed.

The Secretary of War has no discretion in the premises, except in respect to the character of the changes to be made and the length of time in which the work shall be completed, but those matters, as was said by this court in *Field* v. *Clark*, relate only to the enforcement of the policy established by Congress. A duty was imposed upon the bridge company to alter its bridge just as soon as the Secretary of War ascertained the existence of a particular fact, to wit, that the bridge was an unreasonable obstruction and notified the bridge company to change its bridge, and it can not be said that in ascertaining such fact and in issuing his notice to make alterations in obedience to the legislative will that the Secretary of War exercised the function of making laws. Legislative power was exercised when Congress declared that the Secretary of War should order and require the bridge company to alter its bridge upon the fact being ascertained and determined by the Secretary that the bridge was an unreasonable obstruction to navigation. What the Secretary was required to do was simply in the execution of an act of Congress. It was not the making of a law. He was the mere agent of the law-making department to ascertain and declare the event upon which its express will was to take effect. It was a part of the law itself as it left the hands of Congress, with the provisions full and complete in themselves making it an offense for the company to

fail to alter its bridge upon a given contingency, to wit, when notified so to do by the Secretary of War after he had determined and ascertained a particular fact which the law required him to determine and to ascertain.

SECTION 18 OF THE ACT OF MARCH 3, 1899, EXAMINED AND ANALYZED.

This statute was designed not only to protect the general public in its paramount rights with respect to navigation, but as a protection to the bridge owners themselves. Upon a close examination it will be found that the law is framed with extreme care and with a view to affording bridge owners unusual protection against vexatious interference on the part of administrative officers of the Federal Government. While the law is undoubtedly intended to afford a means for the abatement of unreasonable obstructions to navigation, the execution of the law is committed, we might say exclusively, to the Secretary of War, but in so doing Congress did not intend or attempt to confer upon the Secretary of War arbitrary power. It will be observed that this law does not authorize the United States to go into a civil or criminal court in the first instance and there prosecute the owners of a bridge which in fact unreasonably obstructs navigation for an abatement of the nuisance. The law is far more considerate of the rights of the owners of such a bridge. It first provides

a method whereby the fact that the bridge is an unreasonable obstruction to navigation shall be called to the attention of the bridge owners in a most effective manner. "When the Secretary of War has good reasons to believe" that a bridge unreasonably obstructs navigation, he is required to give the owners of such a bridge notice to that effect and an opportunity to be heard; and if after such hearing the Secretary of War reaches the conclusion, upon all the facts presented before him, that the bridge under consideration is, in fact, an unreasonable obstruction to navigation, the law thereupon imposes the further duty upon the Secretary of War to notify the bridge owners that in his judgment the bridge is an unreasonable obstruction to navigation, that it must be altered and changed in a particular manner, specifying a reasonable time in which to make such changes and alterations. Up to this time the owners of the offending bridge have not been subjected to any liability, civil or criminal. The enforcement of the law has been held in abeyance. They have had notice and an opportunity for a full hearing before an administrative officer whose duty it is to ascertain the fact. After the notice is given, however, the law imposes upon the bridge owners a duty to make the changes specified within the time named in the notice, and their failure to make such changes within the time specified, which is tantamount to maintaining an unreason-

able obstruction to navigation, is made by the law a criminal offense. It is likewise made a criminal offense for the owners of such a bridge to maintain the same for a period of thirty days after the expiration of the time specified in the order of the Secretary of War.

It will, we think, be conceded that it would be practically impossible for Congress to consider, except thru the administrative officers of the Government, the hundreds of bridges which in the year 1899 had already been constructed across the navigable waterways of the United States under the authority of State laws; at that time there also existed many bridges which years ago had been constructed under general or special acts of Congress, and which in the course of time from one cause or another and by reason of improved and changed methods of carrying on the commerce upon the rivers crost by such bridges had become dangerous and unreasonable impediments to navigation.

In other words, Congress has legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to the executive officials the duty of ascertaining the facts and performing certain acts required to be ascertained and performed by the statute and upon the happening of which the law was intended to take effect.

THE PHRASE "WILLFULLY FAIL OR REFUSE TO COMPLY WITH THE LAWFUL ORDER OF THE SECRETARY OF WAR IN THE PREMISES" CONSIDERED.

It may be contended that the expression "willfully fail or refuse to remove the same or to comply with the lawful order of the Secretary of War in the premises" is a delegation to the Secretary of War of legislative power, for the reason that a failure to comply with his order to change the bridge within the time specified is made a misdemeanor. We are willing to concede that the wording of the statute might, perhaps, have been more happy and appropriate—as, for example, the statute might have declared it a misdemeanor for the owners of such a bridge to maintain the same for the period specified in the notice from the Secretary of War without making the alterations suggested, but this objection is more fancied than real. A wilful failure to remove the bridge or to comply with the lawful order of the Secretary of War charges in substance that the bridge company during such time has maintained an unreasonable obstruction to the free navigation of the Allegheny River, and has failed and refused to abate the nuisance. If, therefore, the form of the statute alone be regarded, it would seem that the offense prescribed is made to depend upon a violation of an order of the Secretary of War, but when the mere form of the statute is brushed aside and the substance

of the charge considered, it is clearly apparent that the offense which Congress had in mind was the wilful failure to abate the nuisance. It is true the Secretary of War is authorized to fix the time within which the nuisance shall be abated, and to prescribe the manner in which the work shall be carried on, but the determination of those questions in no proper sense involves an exercise of legislative power. Such acts of the Secretary of War amount to nothing more than the determination of certain facts upon the happening of which the will of Congress becomes operative.

EVERY ACT OF THE SECRETARY OF WAR PURELY ADMINISTRATIVE.

Upon examination of the record in this case it will be found that every act of the Secretary of War required to be performed by him under this statute was administrative in character rather than legislative. In August, 1902, the Secretary of War, thru a complaint filed with him by certain citizens of Pittsburg wherein it was alleged that the Union Bridge was an unreasonable obstruction to the free navigation of the Allegheny River, had good reason to believe that this bridge was in fact an unreasonable obstruction to navigation; the Secretary thereupon gave the bridge company notice and an opportunity to be heard before an official of the War Department then stationed at Pittsburg. Such hearing was had

in the post-office building at Pittsburg in the month of November, 1902, and Captain Sibert, in an exhaustive review of the evidence adduced before him, reported the facts, together with his conclusions, to the Chief of Engineers of the United States Army at Washington. That officer in turn found the bridge to be an unreasonable obstruction to the navigation of the Allegheny River, and recommended to the Secretary of War that the company be required to alter its bridge, whereupon the Secretary of War, after having approved such findings of fact, issued his notice to the bridge company on January 20, 1903, requiring the changes and alterations therein specified to be made within eighteen months from the 26th of January (Record, p. 110). In no step of the proceedings did the Secretary of War act arbitrarily, but always under and pursuant to the express requirements of the law. The order which he issued, therefore, became *prima facie* a lawful order having behind it the sanction of Congress for its observance and enforcement. Such order the bridge company wilfully failed and refused to obey, and in so doing failed to observe the will of Congress constitutionally exprest. The bridge company in so doing made itself liable to the penalty which Congress had prescribed in the event of such failure. It is difficult to see in what manner the Secretary of War has assumed to exercise a legislative function. Such a law does nothing more than provide that a person

owning a bridge which is an unreasonable obstruction to the free navigation of a navigable river of the United States shall be guilty of an offense punishable by fine if he fails to obey a law which Congress in its judgment has seen fit to make operative on the happening of certain future acts to be performed by an administrative officer and with reference to the performance of which Congress has exercised a direct supervision and control.

THE INFORMATION CHARGES A WILFUL FAILURE AND REFUSAL TO ABATE THIS OBSTRUCTION FOR MORE THAN ONE MONTH AFTER THE FIRST DAY OF JANUARY, 1905.

The law here under consideration not only makes it an offense to wilfully fail and refuse to remove an unreasonable obstruction to navigation in the manner prescribed by the Secretary of War within the time designated in his notice, but also provides that "*every month such persons, corporation, or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense and subject the persons, corporation, or association so offending to the penalties above prescribed.*" It will be observed that under this provision of section 18 the Union Bridge Company at the time of the filing of this information, to wit, September 27, 1905 (Record, p. 79), had become liable to a prosecution for having wilfully failed and refused for a period of one month since the 1st day of January, 1905, to alter its bridge in

the manner prescribed by the Secretary of War. The information (Record, p. 77) charges that "the said alteration was not made and *has not since been made*." This point is merely suggested as possibly obviating some of the difficulties which have been suggested under a prosecution charging *a failure to comply with the lawful order of the Secretary of War*. Of course, the charge contained in the information when fairly considered amounts to a failure to remove the obstruction within the time allowed by the Secretary of War, but inasmuch as the whole case was rested upon constitutional questions raised upon the trial by counsel for the plaintiff in error and the defendant was in no way misled with respect to the offense or offenses charged, the Government ought to be entitled to rest its case upon any theory of the information which would avoid any constitutional objections. In other words, if the constitutionality of this law can be sustained on the theory that Congress has the power to make the *maintenance* of such a bridge a criminal offense *after* the Secretary of War has found it to be an unreasonable obstruction and ordered the company to remove it or alter it so as to render it unobjectionable within a certain time, then, and in such case, the Government under this information should be entitled to claim that this conviction may be sustained upon this theory.

THE ORDER OF THE SECRETARY OF WAR REQUIRING THE BRIDGE COMPANY TO ALTER ITS BRIDGE CONSIDERED AS A REGULATION HAVING THE FORCE OF LAW.

As we have before observed, the act in question does not authorize the Secretary of War to act arbitrarily. The party whose rights are affected is entitled to a hearing; to receive notice and a specification of the alterations required, and to have a reasonable time in which to make the prescribed changes. Not until all these steps have been taken does a wilful failure to comply with the order of the Secretary of War become a punishable offense. There can be no doubt as to the power of Congress to attach such consequence to a failure to observe the requirements of the Secretary. Regulations prescribed by executive officials under authority granted by Congress, as has been frequently held, are regulations prescribed by law, and have the force of law. The only question which has ever been raised where such authority has been granted was as to the intention of Congress to make the violation of such regulations a criminal offense.

UNITED STATES v. EATON (144 U. S., 677).

This case involved the construction of the act of Congress of August 2, 1886, in relation to oleomargarine. The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, made a regulation, as he was authorized

to do under that law, requiring the wholesale dealers in oleomargarine to keep books and make a monthly return showing certain prescribed matters. Eaton was indicted for failure to comply with such regulation. Upon a certificate of division to this court it was held that while the regulation was authorized the law did not subject the party violating it to a criminal prosecution. It was, however, intimated that if the law had made the failure to comply with the regulation of the Commissioner a criminal offense the conviction would have been sustained.

Mr. Justice Blatchford, in delivering the opinion of the court, said:

> It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offence; and we do not think that the statutory authority in the present case is sufficient. If Congress intended to make it an offence for wholesale dealers in oleomargarine to omit to keep books and render returns as required by regulations to be made by the Commissioner of Internal Revenue, it would have done so distinctly, in connection with an enactment such as that above recited made in section 41 of the act of October 1, 1890.
>
> Regulations prescribed by the President and by the heads of Departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a

> proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offence in a citizen, where a statute does not distinctly make the neglect in question a criminal offence.

See also *In re Kollock* (165 U. S., 526).

In the *Eaton case*, *supra*, the only difficulty seems to have been that the act authorizing the regulation did not in express terms make it a criminal offense to fail to comply with such regulation. In the case at bar, however, the law under consideration authorizes the Secretary of War to regulate the manner in which the nuisance shall be abated and imposes upon the bridge owner a duty to comply with such regulations or order from the Secretary of War. In addition to all this the statute makes it a misdemeanor for the bridge owners to wilfully fail, neglect, and refuse to comply with such regulations and order. It should be noted that the bridge owner is not absolutely required to comply with the regulations and order of the Secretary of War. He may avoid all further controversy in the matter by simply removing the offending structure. If, however, he elects to maintain the bridge, he can not escape the penalty which the law imposes for maintaining an unreasonable obstruction to navigation, except by compliance with the lawful order or regulation of the Secretary of War respecting the changes and alterations to be made.

This case came before Mr. Justice Lamar in 1889, while holding Circuit Court in the Eastern District of Louisiana. Section 5 of the act of Congress of August 11, 1888, authorized the Secretary of War to make such rules and regulations as might be necessary to protect the improvements then being made on the south pass of the Mississippi River, and further provided, that any violation of the rules and regulations so made should constitute a misdemeanor against the United States. Under authority of that law the Secretary of War made and published a regulation by which steam vessels navigating the south pass were required to reduce their speed so as not to exceed 10 miles per hour. The defendant Breen was indicted on the charge of having violated that regulation. A demurrer was interposed to the indictment and the case was heard before Mr. Justice Lamar and Circuit Judge Pardee. In the opinion of the court overruling the demurrer Mr. Justice Lamar said:

> If the law empowered the Secretary of War, by rule or regulation, to make a certain act criminal and punishable as such, then this prosecution would not be maintainable; but it is not the rule and regulation which declares the violation thereof a crime and punishable. All that the Secretary is authorized to do is to make the rule and regulation. It is the act of Congress which declares that the unlawful and willful viola-

tion of such rule and regulation after it is promulgated shall be held a misdemeanor by the person violating the same, and that such person shall be sentenced to pay a fine not exceeding $500, and shall suffer imprisonment not exceeding six months as a penalty therefor. Numerous acts of Congress have been passed authorizing the Postmaster-General and other members of the executive department to make rules and regulations for the business pertaining to their respective Departments, and declaring that when made and promulgated a willful and unlawful violation of them should be held a crime against the United States and the violators punished as prescribed in the act. The Supreme Court of the United States is authorized by act of Congress to adopt certain rules for the government of the inferior courts, which when made have the force and effect of law as much as if such rules were directly enacted by Congress and approved by the President. The same effect is to be given to the rule and regulation made by the Secretary in this case. The act of Congress denounces the violation of it as a crime and prescribes the penalty. The criminality of the violation of the rule and the liability of the offender to indictment and to punishment upon trial and conviction result directly and exclusively from the legislation of Congress. Numerous decisions made by the Supreme Court of the United States might be cited to maintain the position

> stated, but they are so well known to the profession that reference to them is deemed unnecessary. The demurrer is therefore overruled.

UNITED STATES v. ORMSBEE (74 FED. REP., 207).

This case arose in the Eastern District of Wisconsin and was decided by District Judge Seaman on May 9, 1896. The defendant, Ormsbee, was indicted for violating certain rules and regulations prescribed by the Secretary of War in relation to canals and similar works owned and operated by the United States. Section 4 of the act of Congress of August 17, 1894, expressly authorized the Secretary of War to prescribe rules and regulations for the use, administration, and navigation of any and all canals and similar works of navigation owned, operated or maintained by the United States as, in his judgment, public necessity should require. The act further provided in express terms that any person who should knowingly and wilfully violate such rules and regulations should be deemed guilty of a misdemeanor and on conviction thereof should be punished by a fine of not exceeding $500, or by imprisonment not exceeding six months, in the discretion of the court. Judge Seaman in denying the motion to quash the indictment, said:

> In this case Congress provides that permission may be granted through rules and regulations to be adopted by the executive

> department having charge of the works. It is true that Congress might prescribe the rules, either in general terms or in detail, but they are clearly of administrative rather than legislative nature, and may be relegated entirely to any executive agency, either with or without direct provisions by Congress. The discretion which is conferred having regard to the use and care of the property of the United States seems to appertain to the executive department and to be of the class defined in *United States* v. *Eliason.* (16 Pet., 291, 301.) The regulations so made constitute the only permission for using the water, and without permission there can be no claim of right to use, I presume, even without declaration by Congress to that effect; but section 7 of the act of September 19, 1890, as amended by the act of July 13, 1892, clearly prohibits any use "unless approved and authorized by the Secretary of War." I am of opinion that regulations for the purpose stated in the indictment may be established by the Secretary of War and that they have the "force of law" within those purposes when adopted and promulgated as directed by the act. (*Gratiot* v. *U. S.*, 4 How., 80, 117.) Therefore the motion to quash the indictment will be overruled.

The Breen and Ormsbee cases, supra, are in many respects quite similar to the case at bar. Section 18 of the act of March 3, 1899, requires the Secretary of War to ascertain and determine

whether a particular bridge complained of is an unreasonable obstruction to navigation. After he has determined such fact, the law imposes upon him the duty of making a rule or regulation directing in what manner the bridge shall be altered and changed for the purpose of securing reasonably free, open, and unobstructed navigation. In making such rule and regulation certain discretionary powers are conferred by Congress upon the Secretary of War, namely, the specification of the manner and the time within which the changes shall be made. The law, then, in express terms declares that a violation of such order or regulation shall be deemed a misdemeanor. The law therefore is substantially the same as the laws which were before the courts in the Breen and Ormsbee cases, supra. If those cases were properly decided, it necessarily follows that the law here under discussion must be regarded as constitutional.

CASES IN WHICH THE CONSTITUTIONALITY OF THIS LAW HAS BEEN SUSTAINED.

UNITED STATES v. CITY OF MOLINE (82 FED. REP., 592).

The Government filed an information in the United States District Court for the Northern District of Illinois in which it was charged that the Secretary of War in pursuance of the statute had notified the city of Moline to so alter its bridge across Rock River by putting in draws, etc., as to make said river at said point practically navigable.

As the period for making the changes had past and the city of Moline still neglected and refused to conform to the order and notice of the Secretary of War and continued to maintain such obstruction in violation of section 5 of the act of September 19, 1890, proceedings were instituted to compel the abatement of the nuisance. It will be observed that that act is almost identical with section 18 of the act of March 3, 1899. A motion was made to quash the information on the ground, among other things, that the law under which the information was framed delegated legislative and judicial powers to the Secretary of War. Judge Grosscup, in overruling the motion, said:

> I have already held, for the purposes of this motion, that Rock River, at the point under consideration, is, in fact, a navigable stream; that Congress has, by the acts, beginning in 1888, relative to the Illinois & Mississippi Canal, assumed jurisdiction of such stream from the point below the bridge to the point above the bridge, between which the canal uses, for its purpose, the river; that through that space of the river the proposed Government work is, in effect, an improvement of the navigation of Rock River; that the bridge of the city of Moline over the river is unprovided with a draw, and is, in such condition, palpably, an obstruction to the navigation of the stream; that the necessity of a draw was recognized with the increase of navigation of the river, and the right to impose it reserved, in the act of leg-

islature creating the bridge franchise. Now, if Congress can constitutionally authorize any of its executive officers to deal with a case like this, whereby the obstruction may be removed and the waterway opened up, without having first passed an act specifically applicable to the given obstruction, these proceedings ought to be maintained. It will be observed that the power claimed in this instance is not to either authorize the building of a bridge, or ordering its construction, thereby drawing with it the decision of what streams Congress either takes or surrenders jurisdiction over. The power claimed is, in effect, an incident only to the execution of the larger purpose of Congress respecting Rock River, and administrative of that purpose. It is one of the essential administrative acts toward carrying out the special acts of Congress, to the effect that through this river, at this point, there shall be a waterway having capacity for vessels of at least 280 tons burden. The bridge, during the time of its present construction, is an effectual obstruction to such waterway. If Congress can, by special act, constitutionally endow the arm of the Secretary of War with power to remove everything that lies in or across that river obstructive to the proposed waterway, why may it not grant such power, with equal efficacy, by a general act applying to all cases as they arise? Whether the act conferring the power be special or general, the War Department becomes simply the arm that

carries out the legislative will. It is true that this involves decision of the Department, but the Department can in no instance be an effective, and at the same time an insensate and unjudging, executive instrument. In administrative undertakings of this character the directions can not be so completely foredrawn by Congress that there will be left no questions to the administrative mind to decide. The test of the legality of the delegation of power is, not that the administrator must himself decide questions as they arise, but are the questions thus presented essentially judicial?

E. A. CHATFIELD CO. ET AL. v. CITY OF NEW HAVEN ET AL. (110 FED. REP., 788).

This was an equity case in which a permanent injunction was asked against the further maintenance by the city of New Haven of a bridge over the West River which was alleged to be an unreasonable obstruction to the free navigation of said river, a navigable waterway of the United States, on account of the bridge not being provided with a draw. The plaintiffs claimed that by reason of such obstruction they were compelled at great labor and expense to construct vessels specially adapted, so that such vessels might be able, under favorable conditions, to pass thru and by said obstruction, but which are unsuitable for general navigation, and that the plaintiffs were further delayed, hindered, and impeded in the navigation of said river. The petition further alleged that the Secretary of

War had found said bridge to be an unreasonable obstruction to navigation and had served notice upon the bridge owners to alter and change the same so as to render the navigation of said river reasonably free, easy, and unobstructed. It became necessary for the court, in passing upon the demurrer which was interposed to the petition, to pass upon the constitutionality of section 18 of the river and harbor act of March 3, 1899.

Circuit Judge Shipman, in the opinion, said:

> Its unconstitutionality is asserted upon the ground that it delegated to the Secretary of War either judicial or legislative power, and this position was sustained in respect to section 9 of the river and harbor bill of 1888, a statute of different provisions in a case involving peculiar circumstances in *U. S.* v. *Keokuk & H. Bridge Co.* (D. C.) (45 Fed., 178). A similar opinion was expressed, obiter, in *U. S.* v. *Rider* (D. C.) (50 Fed., 406). Section 4 of the act of 1890, which is substantially like section 18 of the act of 1899, came before Judge Grosscup in *U. S.* v. *City of Moline* (D. C.) (82 Fed., 592), in an information by the United States against the city of Moline, and the constitutionality of the act was assailed. In the opinion of the court a distinction properly exists between judicial and administrative questions, and it is said with force that if Congress is prohibited from submitting to the decision of the Departments administrative questions which are constantly arising, the Government would be clogged.

It is apparent that the section does not delegate to the Secretary all the power of Congress in regard to the construction of bridges over navigable waters, and to declare where bridges shall be built, but it delegates the power only to determine whether an existing bridge is an unreasonable obstruction to navigation, and to direct the manner in which the injury can be obviated. (*Lake Shore & M. S. R. Co.* v. *Ohio*, 165 U. S., 365, 17 Sup. Ct., 357, 41 L. Ed., 747.) I see no adequate reason to differ from the views of Judge Grosscup in regard to the construction of the section in question.

CASES IN WHICH THIS LAW WAS UNDER CONSIDERATION BEFORE THIS COURT THO ITS CONSTITUTIONALITY WAS NOT PAST UPON.

LAKE SHORE & MICHIGAN SOUTHERN RAILWAY CO. v. OHIO (165 U. S., 365).

This was a proceeding by *quo warranto* ordering the defendant to absolutely remove its bridge or to modify its structure by creating an adequate draw span therein. The bridge was one which had been erected by the railroad company over the Ashtabula River, a short distance above the point where that stream empties into Lake Erie. The State court held that the corporation had abused its franchise in that it had created a public nuisance in impeding the navigation of the river, which was wholly within the State of Ohio. The railroad company brought the case to this court on a writ of error to the Supreme Court of the State of Ohio

denying the jurisdiction of the courts of the State of Ohio to control the subject-matter of the controversy on the theory that the determination of whether the defendant possest the right to erect a bridge and to continue it, altho constructed without authority, was a Federal question and not a State question. This court, in an opinion by Mr. Justice White, denied the contention of the railroad company and in the course of the opinion said:

> On the face of this statute it is obvious that it does not support the claim based upon it. Conceding, without deciding that the words "waterways of the United States" therein used apply to all navigable waters, even though they be wholly situated within a State, and passing, also, without deciding the contention that Congress can lawfully delegate to the Secretary of War all its power to authorize structures of every kind over all navigable waters, nothing in the statute gives rise even to the implication that it was intended to confer such power on the Secretary of War. The mere delegation to the Secretary of the right to determine whether a structure authorized by law has been so built as to impede commerce, and to direct, when reasonably necessary, its modification so as to remove such impediment, does not confer upon that officer power to give original authority to build bridges, nor does it presuppose that Congress conceived that it was lodging in the Secretary power to that end. When the distinction between an authorized structure so erected as to impede

commerce and an unauthorized work of the same character is borne in mind, the fallacy of the contention relied on becomes apparent. The mere delegation of power to direct a change in lawful structures so as to cause them not to interfere with commerce can not be construed as conferring on the officer named the right to determine when and where a bridge may be built. If the interpretation claimed were to be given to the act, its necessary effect would be that Congress, in creating an additional means to control bridges erected by authority of law, had, by implication, confirmed and made valid every bridge built without sanction of law.

RIDER v. UNITED STATES (178 U. S. 251).

This case was a prosecution upon a criminal information filed on behalf of the United States against the plaintiffs in error as commissioners of the county of Muskingum, Ohio, having power under the laws of Ohio to control, alter, and keep in repair all necessary bridges over streams and public canals on all State and county roads. The information was based upon the fifth and sixth sections of the river and harbor act of September 19, 1890. The judgment of the Circuit Court was reversed upon the ground that the county commissioners could not be convicted of a criminal offense in refusing to comply with the order of the Secretary of War to alter the bridge when it was shown that they did not have in their hands, and,

under the laws of the State of Ohio defining and limiting the powers of the commissioners, it was not possible for them by any levy of taxes to raise the money necessary to alter the bridge within the time limit by the notice from the Secretary of War. Mr. Justice Harlan, in the course of his opinion, said:

> The plaintiffs in error contend that those provisions are inconsistent with the Constitution of the United States in that Congress has assumed to give the Secretary of War authority to determine matters that are legislative in their nature.
>
> On behalf of the Government it is contended that the act of Congress has not delegated legislative power to the Secretary, but has only given to that officer authority to determine the existence of certain facts as the foundation of such action by him as might be necessary to give effect to the declared purpose of Congress to remove unreasonable obstructions to the free navigation of the waterways of the United States. (*Field* v. *Clark*, 143 U. S., 649, 693.)
>
> The discussion of counsel also involved the question whether—assuming the act in question not liable to the objection that it delegated legislative power to the head of an executive department—the expense to be incurred in the alteration of the bridge in question, which was originally constructed in accordance with law, must not be borne by the United States, which by its

> own agents made the proposed alteration of the bridge necessary for the purposes of navigation.
>
> These are questions of very considerable importance; but, in the view we have taken of the case, their determination is not now necessary. The record presents another question which, being determined in favor of the plaintiffs in error, requires a reversal of the judgment upon grounds that will protect them altogether against the present prosecution for not complying with the order issued from the War Department.

In conclusion, the following points are suggested in support of the Government's contention that this law is constitutional:

(1) It must be conceded that Congress has the power to require the Union Bridge Company by a special law to make the specific changes and alterations in its bridge which the Secretary of War has ordered in this case, and in the event of the company's refusal so to do, to compel a removal of the bridge.

(2) Congress has enacted four distinct laws wherein the administrative officers of the Government have been authorized and required to proceed in precisely the same manner as they have proceeded in this case, and has made it a misdemeanor for the owner of such a bridge to wilfully fail and refuse to comply with the lawful order of the Secretary of War.

(3) This court has repeatedly declared that every presumption exists in favor of the constitutionality of an act of Congress and that a law will never be declared invalid on such ground unless its unconstitutionality is clearly established.

(4) Three Federal courts up to the present time have rendered decisions sustaining the constitutionality of this law after a full consideration of all the questions raised and discust in this case.

(5) Numerous decisions of this court have been cited in which laws quite similar to the one here under consideration have been held to be constitutional.

It is therefore respectfully submitted that the decision and judgment of the District Court for the Western District of Pennsylvania in this case should be affirmed.

MILTON D. PURDY,
Assistant to the Attorney-General.

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